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Union of Concerned Scientists

Citizens and Scientists for Environmental Solutions

February 5, 2002

Mr. Michael Lesar, Chief
Rules and Directives Branch
Division of Administrative Services
Office of Administration, Mail Stop T-6 D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

SUBJECT: BELATED COMMENTS ON NRC ENFORCEMENT PROGRAM AND ALTERNATIVE DISPUTE RESOLUTION

Dear Mr.Lesar:

The December 14, 2001, *Federal Register* (Vol. 66, No. 241) contained a request for comments by the Nuclear Regulatory Commission on the use of alternative dispute resolution (ADR) in enforcement cases. The public comment period for this notice ended January 28, 2002.

On January 30, 2002, Mr. Terrence Reis of the NRC staff e-mailed me, along with several other external stakeholders. Mr. Reis informed us that the comment period had passed, but that the NRC had received:

> *"very few comments to date. This is possibly due to the fact that the portion of the Web that it would normally be posted is currently not available to the public and stakeholders may have fallen out of practice of checking the Federal Register. As such, we are providing the FRN directly to those stakeholders who have commented on related issues in the past."*

Mr. Reis' suspicions were correct, at least in our case. The first indication we had of the NRC's solicitation of public comment was Mr. Reis' e-mail after the formal public comment period had ended.

Attached are UCS's comments on ADR within the NRC's enforcement program. We appreciate this opportunity to provide comments, albeit belatedly, on this important issue.

Sincerely,

David Lochbaum
Nuclear Safety Engineer
Washington Office

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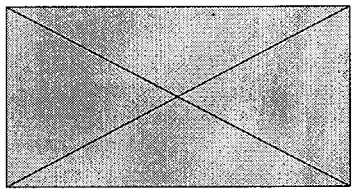

Comments on ADR in the Enforcement Process

The December 14, 2001, *Federal Register* notice expressly sought responses to eleven questions posed by the NRC staff regarding the use of alternate dispute resolution (ADR) in its enforcement process. UCS provides responses to those questions below.

In general, UCS is disappointed that the NRC would consider providing its licensees with the option of ADR when challenging enforcement decisions at the same time the agency is trying to restrict the public's rights when challenging other NRC decisions. It reinforces the already very strong impression that the NRC is an agency beholding to the nuclear industry and not to the public it guards.

The NRC's existing enforcement policy affords plenty of opportunities for licensees to influence the agency's enforcement decisions. Licensees have numerous formal opportunities to dispute the underlying fact set developed by the NRC staff. Licensees already have formal appeal processes when they disagree with NRC staff enforcement decisions.

ADR is simply an attempt by the nuclear industry to further weaken the NRC's enforcement program by adding yet another appeal option to an already full plate of options. Judging by the recent trial ADR in which FirstEnergy beat the NRC enforcement staff like a drum, the public is ill-served by anything that weakens the NRC's feeble enforcement program.

Ample evidence exists to convince reasonable people that the NRC's enforcement program suffers from being untimely, secretive, and subjective. ADR can only make the enforcement program more untimely, more secretive, and more subjective.

UCS strongly feels that the NRC should not use ADR in the enforcement area. If the agency permits its licensees to seek ADR when they contest with a proposed enforcement sanction, the agency must also permit others to seek ADR when they contest the lack of a proposed enforcement sanction. There's no logical reason to believe that the NRC staff can only make an error when it decides to impose a sanction. The equal protection standard dictates that ADR be made available when the NRC staff makes an error by deciding <u>not</u> to impose a sanction.

UCS's responses to specific staff questions are as follows:

1. **Is there a need to provide additional avenues, beyond the encouragement of settlement in 10 CFR 2.203, for the use of ADR in NRC enforcement activities?**

   Nope.

2. **What are the potential benefits of using ADR in the NRC enforcement process?**

From the public-interest perspective, absolutely none whatsoever.

3. What are the potential disadvantages of using ADR in the NRC enforcement process?

- ADR could reinforce the perception that the NRC enforcement process uses a "Wheel of Misfortune" causing seemingly identical violations to receive widely disparate sanctions.
- ADR could slow down what is already an excruciatingly slow bureaucratic process (if, in fact, that is even physically possible) and make decisions even more untimely. If "justice delayed is justice denied," there's been no justice in the NRC's enforcement process for many, many years.
- ADR could further restrict participation by one party that deserves to be involved in the enforcement process; namely, the alleged victim in 50.7-type violations. The existing enforcement process permits the victim to attend the pre-decisional enforcement conference and provide invaluable insights to the other parties. The ADR, if added to the existing pre-decisional conference scheme, makes it harder for the victim to participate.
- ADR could further reduce public confidence in the NRC's regulatory prowess.
- ADR sends a clear message that the NRC has abandoned its regulatory authority to enforce regulations purportedly promulgated to protect the public.
- ADR, as tried in the recent FirstEnergy dispute involving discrimination at the Perry nuclear plant, was a hideous abomination that made a complete mockery out of the NRC enforcement process. UCS views hideous abominations as being disadvantageous.
- ADR, as evidenced in the recent FirstEnergy fiasco, expends agency resources that could be more productively applied doing real work.

4. What should be the scope of disputes in which ADR techniques could be utilized?

ADR should not be used in the enforcement area.

If ADR must be used, its scope should be limited to defining the fact set for the underlying violation.

5. At what points in the existing enforcement process might ADR be used?

ADR should not be used in the enforcement area.

If it is to have a role, ADR should be considered only in establishing the fact set that is then used by the NRC staff to determine sanctions. For example, there might be a legitimate difference of opinion between the NRC staff and the plant owner with respect to when a non-conforming condition was (or should have been) identified, whether the cause of a violation was willful, and so on. The neutral party under ADR could provide some value by weighting the differing inputs and providing an impartial definition of the fact set.

ADR is more distasteful when it is used to challenge a proposed sanction. At that stage, it smacks of negotiating a deal. It might be real-life that someone who drives his car onto a sidewalk and kills a few pedestrians can strike a plea bargain with a savvy attorney to avoid murder or manslaughter charges and get aggravated assault instead, but it's certainly not the judicial system to use as a role model.

6. What types of ADR techniques might be used most effectively in the NRC enforcement process?

N/a - it's an oxymoron to put "ADR" and "effective" together in a sentence about enforcement.

7. Does the nature of the existing enforcement process for either reactor or material licensees limit the effectiveness of ADR?

It appears that ADR is only being considered in enforcement cases where the NRC proposes to sanction a licensee and that licensee disagrees. It appears that ADR is being considered when the licensee disagrees with the underlying fact set (i.e., contesting the violation) and when the licensee agrees with the fact set but disagrees with the severity of the sanction (i.e., conceding the violation but protesting its significance).

If the NRC were fair, then it would also institute a comparable ADR process when the licensee accepts the fact set or sanction, but other parties disagree. For example, if the matter involves alleged harassment of a nuclear plant worker and the NRC staff accepts the licensee's argument that the reason for retaliation was related to a non-protected activity basis, the alleged victim should have some avenue (a.k.a. ADR) to contest that NRC decision. It is blatantly unfair to assume that the NRC can never, ever erroneously decide against a worker or the public and thus only provide licensees with ADR options. It is unreasonable to assume that the NRC can only error when it proposes a sanction. Equal protection is warranted when the NRC makes an error by not proposing a sanction.

8. Would any need for confidentiality in the ADR process be perceived by the public?

The more that deals are brokered behind closed doors—for any reason—can only expand the widely perceived impression that the NRC is returning to the old AEC daze with its inappropriately close relationship with the industry it allegedly regulates.

UCS has released reports where we assembled information on NRC enforcement actions over a period of time. We pointed out many instances where the NRC staff imposed different sanctions for what appeared to be virtually identical violations. Subsequent discussions with NRC staff revealed particulars that may have explained why different sanctions were warranted. Those details were not available in the enforcement letters/reports issued on the violations. Any further clouding of the NRC staff's real reasons for taking or not taking enforcement actions can only erode public confidence.

9. For policy reasons, are there any enforcement areas where ADR should not be used, e.g., wrongdoing, employment discrimination, or precedent-setting areas?

ADR should not be used PERIOD. ADR should never be used in wrongdoing cases since the industry seems unable to concede that there is ever wrongdoing, at least by its managers. ADR should never be used in employment discrimination cases unless the apparent victim has a real opportunity for meaningful participation. If used, ADR would have to be used in precedent-setting cases since the factors and decisions from all past cases—ADR or not—become fair game for precedents.

10. What factors should be considered in instituting an ADR process for the enforcement area?

ADR should not be used in the enforcement area for any reason.

If something akin to ADR must be used, the revised process must allow for both sides to an NRC enforcement decision to have equal access to it. It would be blatantly unfair for the NRC to adopt an ADR process that allows its licensees to invoke it when they are disenchanted with an NRC decision that a sanction should be imposed for a 50.7 violation but does not allow injured workers from invoking it when they disagree with an NRC decision that sanctions should not be imposed.

11. What should serve as the source of neutrals for use in the ADR process for enforcement?

ADR should not be used in the enforcement area.

If ADR must be used, members of the NRC Atomic Safety and Licensing Board seem to be best source of neutrals.